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CHARLES ELMORE OROPLEY

Supreme Court of the United States.

OCTOBER TERM, 1944.

No. 1256

BOSTON AND MAINE RAILROAD,
Petitioner,

v.

EDWARD L. CABANA,
Respondent.

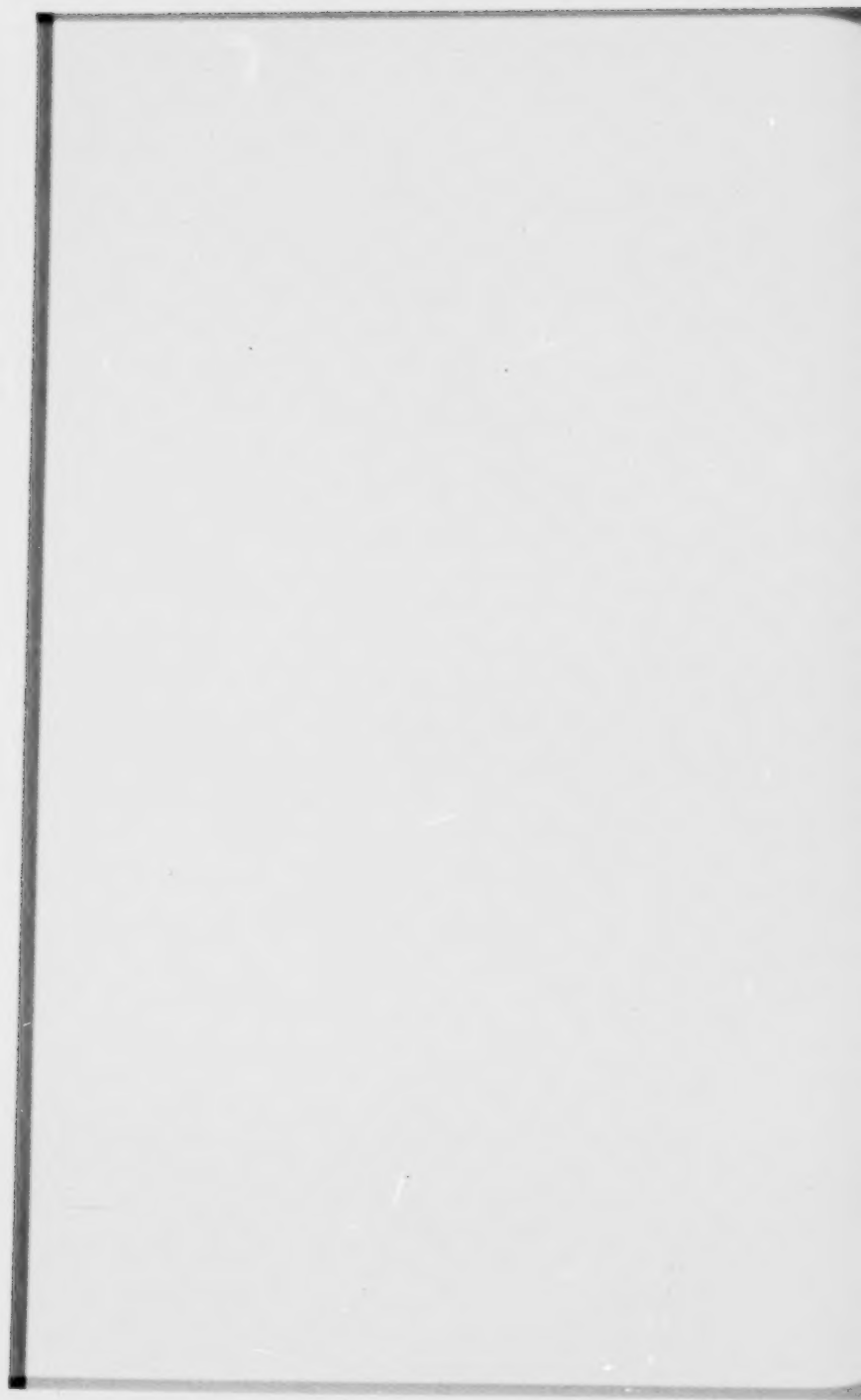
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

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HURLBURT, JONES, HALL & BICKFORD.



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Petitioner,

v.

EDWARD L. CABANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.

To the Honorable Supreme Court of the United States:

The petitioner, Boston and Maine Railroad, a corporation duly organized under the laws of the Commonwealth of Massachusetts, hereinafter referred to as the defendant, respectfully prays that a writ of certiorari be issued requiring to be certified to this Honorable Court for review and determination a cause in which it is the defendant-appellant, and in which the respondent, Edward L. Cabana of the Commonwealth of Massachusetts, hereinafter referred to as the plaintiff, is the plaintiff-appellee.

1. Statement of the Matter Involved.

The action, which is one of tort for personal injuries, was brought under the Employers' Liability Act by writ dated March 15, 1944, in the District Court of the United States for the District of Massachusetts (R. p. 1).

The complaint (filed March 15, 1944) (R. pp. 1-4) is in two counts. The first count alleges, in substance, that the action is brought under the Employers' Liability Act; that the defendant railroad is engaged in interstate commerce, and on August 17, 1943, for the purpose of carrying on said commerce, maintained a roundhouse known as the New Terminal Engine House at Boston, where, among other work done, locomotives engaged in interstate commerce were actually repaired in connection with and for the purpose of such interstate commerce; that it was the duty of the defendant to furnish a reasonably safe place for its employees, including the plaintiff, in which to do their work, but in violation of said duty the defendant maintained said premises in an unsafe and dangerous condition in that the defendant for a long time prior to August 17, 1943, negligently suffered and permitted said premises to be dark and insufficiently lighted, subjecting said employees, including the plaintiff, to the risk and danger of injury from said condition, and the defendant for several years negligently failed to furnish and maintain the necessary artificial illumination to protect its employees, including the plaintiff, from injury arising from the darkness which existed in said engine house; that the defendant well knew of said unsafe and dangerous condition and on many and divers occasions was warned of the existence of said condition and the consequent danger thereof, but, notwithstanding said warnings of the condition and the danger to its employees, which condition the defendant well knew as aforesaid, the defendant neglected to provide and maintain sufficient artificial lighting facilities to safeguard its employees, including the plaintiff, from injury or death by accident which might reasonably be foreseen would result from such a condition; that the plaintiff was employed by the defendant in interstate commerce and on August 17, 1943, was working on the repair of a locomotive

owned by said defendant in said engine house, as a helper to another machinist of the defendant, and in the course of said repair and while plaintiff and his fellow employee were so engaged both feet of the said plaintiff were run into and over by the wheels of another locomotive which was then and there being backed by another employee of the defendant railroad onto the track within and around which the plaintiff was working; that such injury arose out of the failure of the operator of the locomotive to observe the plaintiff, which failure was caused in whole or in part by the darkness which existed in said engine house, due to the negligence of the defendant railroad as aforesaid, in consequence of which the plaintiff herein has been permanently incapacitated, has been unable to do any work or in any way earn his living, and has incurred large bills for medical treatment and for nursing and care which it was necessary to have by reason of said injuries.

The second count alleges in substance that on August 17, 1943, at the time and place and in the manner stated in the foregoing count of the complaint, while in the employ of the defendant and working with a fellow employee in the repair of a locomotive owned by the defendant, suddenly and without warning, his two feet were run into and over by the wheels of a locomotive owned by the defendant railroad which was then and there backed onto the track within and around which plaintiff was working; that such injuries resulted in whole or in part from the negligence of said servant or agent of the defendant, who operated and backed said locomotive in a careless, unskillful and negligent manner, whereby the plaintiff suffered the injuries complained of, in consequence of which plaintiff has become permanently incapacitated and unable to earn his living and has incurred large medical bills for doctors, medicines and hospitalization, all of which arose in whole or in part through the negligence of the defendant by and through its servant or agent as aforesaid.

The defendant's answer (R. pp. 4-5) (filed March 30, 1944) to the first count admits that the defendant was engaged in interstate commerce; that it was its duty to provide a reasonably safe place for its employees, including the plaintiff, in which to do their work; and that the plaintiff was employed by the defendant on August 17, 1943; but denies that the plaintiff was engaged in interstate commerce, and denies all the other allegations of the first count.

The defendant's answer to the second count (R. p. 5) admits that the plaintiff was in the employ of the defendant on or about August 17, 1943, but denies all the other allegations of the second count except such as are expressly admitted under the first count.

Further answering both counts, the defendant denies that the plaintiff was injured through any negligence on the part of the defendant; and alleges in substance that the plaintiff's own negligence was the sole proximate cause of his injuries; and that the plaintiff's own negligence contributed in whole or in part to his injuries.

The case was tried before Wyzanski, J., and a jury on October 24, 25, and 26, 1944, in the District Court of the United States for the District of Massachusetts (R. p. 5). The jury returned a verdict for the plaintiff on the first count in the sum of nine thousand (9000) dollars, and on the second count returned a verdict for the defendant, and thereafter, on October 27, 1944, upon the verdict and stipulation of the parties that the amount of the verdict should be reduced by nine hundred (900) dollars, judgment was entered for the plaintiff on the first count in the sum of eight thousand one hundred (8100) dollars, and for his costs, and judgment for the defendant with its costs on the second count (R. pp. 8-9).

From the judgment for the plaintiff on the first count the defendant appealed to the Circuit Court of Appeals

for the First Circuit, and notice of appeal was filed by the defendant November 2, 1944 (R. p. 199).

On March 23, 1945, the Circuit Court of Appeals for the First Circuit affirmed the judgment of the District Court. In the opinion (R. pp. 205-212) the court said (R. p. 211):

“As we view the case, however, it is not necessary to decide the question raised by the appellant whether or not it was physically possible for the hostler to see around or over the tender and to decide if the jury could reasonably infer that had there been adequate lighting, the hostler would have been able to see the plaintiff in time to avoid the accident. Whether or not he was in a position to see the plaintiff, the evidence clearly warrants a finding that if there had been adequate lighting the plaintiff would have been able to see the backing engine in time to get out of the way.”

2. Jurisdiction.

Jurisdiction to review this cause exists under Judicial Code, sec. 240 (a), as amended by Act of February 13, 1925, c. 229, § 1; 43 Stat. 938; U.S.C. Tit. 28, c. 9, § 347.

The date of entry of the judgment in the cause sought to be reviewed was March 23, 1945 (R. p. 212). The judgment was rendered by the Circuit Court of Appeals for the First Circuit.

3. Questions Presented.

The questions presented for the consideration of the Supreme Court of the United States are as follows:

I. Was the defendant guilty of any breach of duty to the plaintiff in regard to lighting at the time and place where the plaintiff was injured?

II. Was the alleged insufficiency of the lighting at the time and place where the plaintiff was injured the proximate cause of his injuries?

III. Was the Circuit Court of Appeals in error in deciding the case upon a ground not raised by the pleadings and not within the theory of the case as tried?

4. Reasons Relied on for Allowance of Writ.

The decision rendered in this cause on March 23, 1945, by the Circuit Court of Appeals for the First Circuit (*Boston and Maine Railroad v. Edward L. Cabana*, R. pp. 205-212) is in conflict with the decisions of this Honorable Court and with the decisions of other courts of last resort, because—

1. The Circuit Court of Appeals erroneously held that the evidence was sufficient to warrant a finding that the defendant was guilty of a breach of duty to the plaintiff in regard to the condition of the lighting at the place where the plaintiff was injured.

2. The Circuit Court of Appeals erroneously held that the evidence was sufficient to warrant a finding that failure to keep the premises properly lighted was the proximate cause of the plaintiff's injuries.

3. The Circuit Court of Appeals erroneously decided the case upon a ground not raised by the pleadings and not within the theory of the case as it was tried.

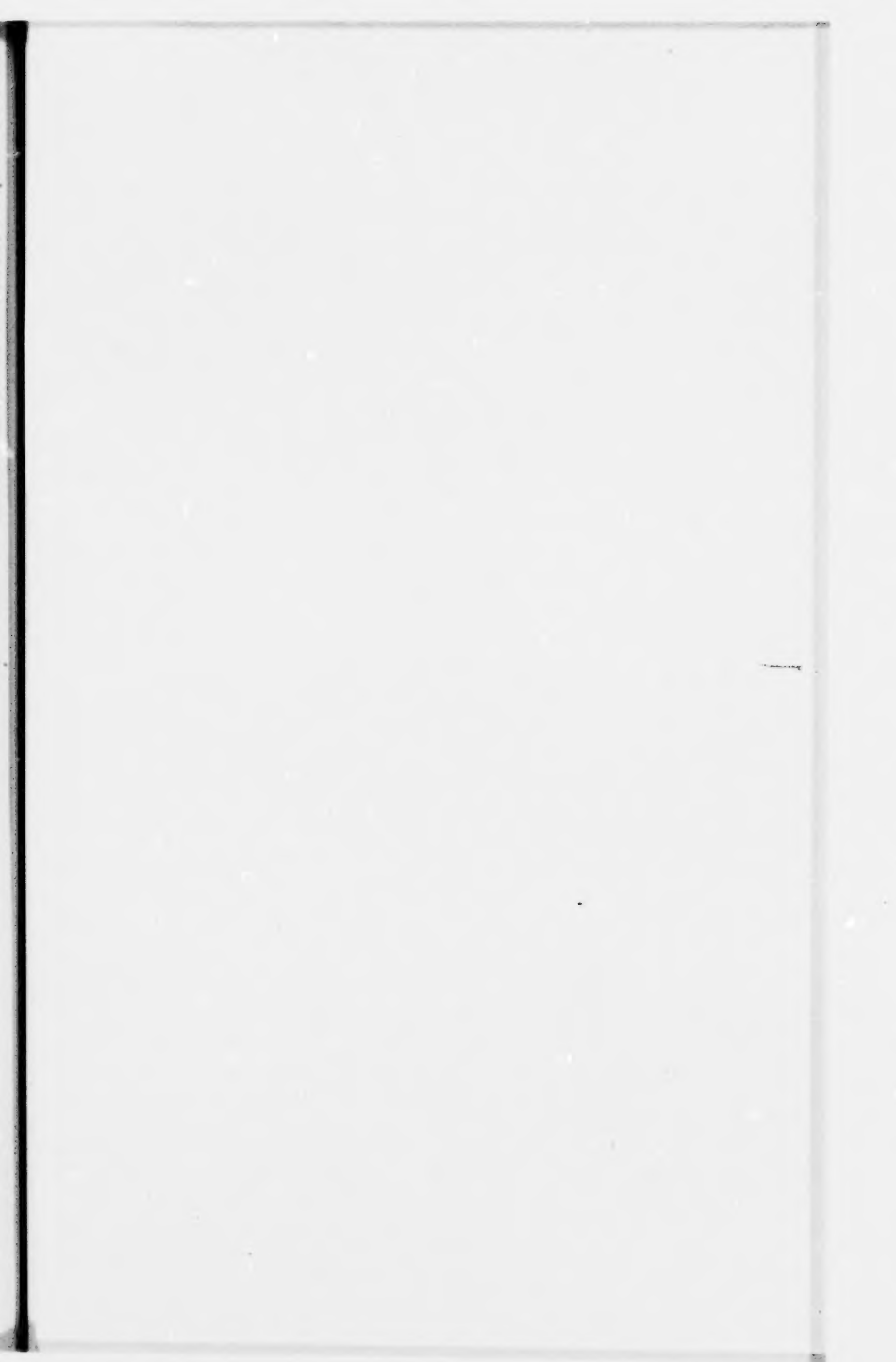
BOSTON AND MAINE RAILROAD, PETITIONER,

By its Attorney,

FRANCIS P. GARLAND.

Of Counsel:

HURLBURT, JONES, HALL & BICKFORD.





Supreme Court of the United States.

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BOSTON AND MAINE RAILROAD,

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v.

EDWARD L. CABANA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Circuit Court of Appeals had not at the time of the preparation of this brief appeared in the Federal Reporter. It is set forth in full on pages 205 through 212 of the record.

Jurisdiction.

Jurisdiction to review this cause exists under Judicial Code, § 240 (a), as amended by Act of February 13, 1925, c. 229, § 1; U.S.C. Tit. 28, c. 9, § 347. The date of entry of judgment in the cause sought to be reviewed was March 23, 1945 (R. p. 212).

Statement of the Case.

This is an action of tort brought under the provisions of an Act of Congress approved April 22, 1908, entitled "An

Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases" (U.S.C. Title 45, §§ 51 *seq.*), as amended, for personal injuries received by the appellee, an employee of the defendant, on August 17, 1943, at the defendant's engine house in Boston (R. pp. 1-4).

Hereinafter the respondent, Edward L. Cabana, will be referred to as the plaintiff, and the petitioner, Boston and Maine Railroad, will be referred to as the defendant.

The writ was filed March 15, 1944 (R. p. 1).

The complaint (R. pp. 1-4) contains two counts. The first count alleges in substance that on August 17, 1943, the plaintiff was working in the defendant's roundhouse, known as the New Terminal Engine House at Boston; that he was struck and injured by a locomotive backing into the roundhouse, *through the failure of the operator of the locomotive to see him*; and that the operator's failure to see him was due to the negligence of the defendant in failing to have the engine house sufficiently lighted. The second count alleges in substance that the plaintiff's injuries resulted in whole or in part from the negligence of the servant or agent of the defendant who operated and backed said locomotive.

The defendant's answer appears at pages 4 and 5 of the record.

The case was tried before Wyzanski, J., and a jury on October 24, 25, and 26, 1944 (R. p. 5), in the District Court of the United States for the District of Massachusetts.

At the close of the evidence the defendant duly and seasonably filed a motion for a directed verdict (R. pp.

6-8). This motion was denied (R. pp. 8, 184), and the defendant's rights were saved (R. p. 184).

On the first count of the complaint the jury returned a verdict for the plaintiff in the sum of \$9000 (R. p. 8), which was reduced by a stipulation of the parties to \$8100 (R. p. 8), and judgment was entered for the plaintiff on the first count in this sum with costs (R. p. 8). On the second count of the complaint the jury returned a verdict for the defendant (R. p. 8), and judgment was entered with costs for the defendant on this count (R. p. 8).

From the judgment for the plaintiff on the first count the defendant claimed an appeal to the Circuit Court of Appeals for the First Circuit (R. p. 9).

The Circuit Court of Appeals for the First Circuit affirmed the judgment of the District Court (R. p. 212).

Statement of Facts.

At the trial the plaintiff testified (R. p. 22) that he was a machinist's helper; that he was first employed by the defendant on January 6, 1943 (R. p. 21), and was assigned as a helper to the machinist Richard Guess sometime in May, 1943 (R. p. 23); that a large part of the time he was working in the section of the roundhouse where pits 46, 47, and 48 are located (R. p. 24); that on August 17, 1943, he arrived at work at 2 o'clock p.m. (R. p. 27) and went to work helping Richard Guess on locomotive No. 3631, which was on pit 48; that they were laying out shoes and wedges so that the driving box and the wheels would be in alignment to the cylinders with the piston (R. p. 24); that he continued that work through the afternoon and early evening; that sometime during the evening Mr. Guess asked

for another machinist to assist them; that he went up a couple of times, the last time being about 8 o'clock (R. pp. 24-25); that from 8 o'clock until the time of the accident they continued to work on that locomotive, awaiting the arrival of the other machinist, mostly puttering around (R. p. 25); that he was not idle during the interval between 8 o'clock and the time of the accident (R. p. 25); that about 9 o'clock Guess told him to hold the train on the other side of the engine; that at that time he was on the right-hand side of the engine, and he could have gone around the front; that he walked down to the back of that engine, and on his way to the other side he stopped and took a leak for himself, and then as he was walking across the walk near the doors he was struck by the rear of an engine which was backing in (R. pp. 25-26); that there was no light on the tender or locomotive 1426; that he heard no signal or bell (R. p. 28); that there were no lights at all in that portion of the engine house where he was struck (R. p. 29); that he recalled only one light up at the forward part of the engine house on pit 48; that he did not recall any other one of the fourteen lights that were lit that night (R. p. 29); that he did not notice any lights outside the engine house that night; that he did not know about the lights at track 48 at any other time than the night of the accident (R. pp. 30-31); that he knew where the switch boxes were in the wall for turning on the electric lights; that as he worked on track 48 he would turn on such lights as were needed for doing the work on that track; that he turned those lights on when he needed them and turned them off when he did not need them (R. p. 42); that he remembered this was the period when dim-out regulations were in force (R. p. 42); that there were dim-out regulations throughout the city; that it was true that during the period when dim-out regulations were in force the men in the engine house turned the lights out when

they were not needed (R. pp. 42-43). The plaintiff further testified that he was working on the right-hand side of the locomotive 3631, which would be nearer to track 47 than to the wall of the building; that he was working near the front wheels of that locomotive (R. pp. 25, 41); that the distance from the front of the locomotive on which he was working to the end of the pit near the wall where the toilet rooms were was about 10 to 15 feet, and the shortest way to get around the locomotive would be to go forward and go down by the wall on the other side (R. pp. 25, 41); that the man Mr. Guess sent for was Mr. Dubois, and Mr. Dubois had not come between the time he was sent for at 8 o'clock and the time of the accident, so there was nothing he could do with Mr. Dubois on the other side of the locomotive before the accident; that he did not go into the toilet room near the head of the engine, but he did, in crossing to the other side, go along track 48 towards the door of the building leading out to the turntable (R. p. 41); that he then started and crossed over to the plank walking from one side of track 48 to the other side, and had gotten a little more than half way across that plank walk when he was struck by the tender of the locomotive (R. p. 42); that he did not remember telling them at the hospital that he was standing in the doorway at the time he was struck (R. p. 40).

In the consideration of this case it is important to bear in mind two things: First, the jury found (R. p. 8, and pp. 3-4 (complaint, 2d count)) that there was no negligence in the operation of the locomotive which struck the plaintiff, and second, dim-out regulations were in force at the time and place of the accident (R. pp. 42-43, 188-189).

Specification of Errors.

1. The court below erred in holding that the evidence was sufficient to warrant a finding that the defendant was guilty of a breach of duty to the plaintiff in regard to the condition of the lighting at the place where the plaintiff was injured.

2. The court below erred in holding that the evidence was sufficient to warrant a finding that failure to keep the premises properly lighted was the proximate cause of the plaintiff's injuries.

3. The court below erred in erroneously deciding the case upon a ground not raised by the pleadings and not within the theory of the case as tried.

Summary of Argument.

The Circuit Court of Appeals for the First Circuit committed reversible error in affirming the judgment of the District Court of the United States for the District of Massachusetts for the following reasons:

I. The evidence was insufficient to warrant a finding that the defendant was guilty of any breach of duty to the plaintiff in regard to the condition of the lighting in the place where the plaintiff was injured.

II. The evidence was insufficient to warrant a finding that failure to keep the premises properly lighted was the proximate cause of the plaintiff's injuries.

III. The Circuit Court of Appeals for the First Circuit erroneously decided the case upon a ground not raised by the pleadings and not within the theory of the case as tried.

Argument.

I. The defendant was not guilty of any breach of duty to the plaintiff in regard to lighting at the time and place where the plaintiff was injured.

1. The defendant had no duty to light the place near the door at the back of the engine house where plaintiff's work did not require him to go.

(a) The plaintiff had been engaged in repair work on the right forward wheels of engine 3631, which was near the end of pit 48 toward the front of the building (R. p. 24). After completing his work on the right-hand side of the engine, the plaintiff was ordered by machinist Guess to go to the left-hand side (R. pp. 25-26). The short and safe way to cross to the other side of this engine was in front of the engine at the front of the building (R. pp. 26, 41) on the walk provided for such purposes, where there were lights burning (R. pp. 29, 47). The plaintiff testified (R. p. 26) that he could have gone around the front, which was the shortest way (R. p. 41). Instead of doing this, he walked down to the back of the engine (R. p. 26) and then went along track 48 toward the door of the building leading out towards the turntable (R. p. 41), and then started and crossed over to the plank walking from one side of track 48 to the other side, and had gotten a little more than half way across that plank walk when he was struck by the tender of the locomotive (R. p. 42), which was backing into the roundhouse on track 48. At this place the lights were kept extinguished during the dim-out regulations (R. pp. 29, 47, 51, 115, 117, 118, 123, 145), and the plaintiff knew that there were no lights there at all (R. p. 29). There was sufficient light near engine 3631 to enable the plaintiff to do the repair work in which he had been engaged with the machinist Guess (R. pp. 42,

45, 47, 50, 51, 56, 60). And the defendant provided the plaintiff with a safe and lighted way to cross to the other side of the engine (R. pp. 26, 41, 47). It did not, therefore, owe him any duty to illuminate another and more distant way of crossing at the rear of the building, where his duties did not require him to go.

Wintermute v. Oregon-Washington R. & N. Co.,

98 Ore. 431, 443, 448.

Buffington v. Boston & Maine R.R., 226 N.Y.S. 302, 306-307.

Atlantic Coast Line R. Co. v. Davis, 279 U.S. 34, 39.

P. & R. Ry. Co. v. Thirouin, 9 Fed. (2d) 856.

In *Wintermute v. Oregon-Washington R. & N. Co.*, 98 Ore. 431, the court said at page 443:

"It is plain from his own testimony that he had the choice of going either way.

"Recurring now to his charges of negligence, we find the first is that the defendant failed to maintain said roundhouse and that portion thereof which defendant was obliged to traverse on the way to the registry-stand in a properly illuminated condition and that the same was dark. The evidence does not sustain this allegation for the plaintiff was not obliged to travel the way he did."

And at page 448:

"Having a thorough knowledge of the situation, and volition to go where he chose, he must be held to have assumed the risk of going the way he did."

In *Buffington v. Boston & Maine R.R.*, 226 N.Y.S. 302, the court said at pages 306-307:

"The witnesses all agreed that the fog or steam around the pit interfered with seeing. Buffington had no duty which called him to the place where he was struck, and the hostler had no reason to expect that any employee would be walking or standing there.

"The risk of the use of the narrow space along the wall as a path by Buffington in the manner and circumstances involved was an obvious risk assumed by him. . . . The danger had existed during all the time he was working there and it was an obvious danger which he must be assumed to have known and appreciated. He therefore assumed the risk."

(b) The order of machinist Guess to go to the other side of the engine (R. pp. 25-26, 54) was not an order to cross at the rear of the building, where the lights were kept extinguished during the "dim-out" regulations (R. pp. 29, 42, 47, 51, 145). The plaintiff could and should have complied with his superior's order by going the safe way. He voluntarily crossed at a point where, as he himself testified (R. p. 29), "There were no lights at all."

Sylvain v. Boston & Maine R.R., 280 Mass. 503, 506.

Wintermute v. Oregon-Washington R. & N. Co., 98 Ore. 431, 443.

Atlantic Coast Line R. Co. v. Davis, 279 U.S. 34, 39.

B. & O. R. Co. v. Berry, 286 U.S. 272, 275.

In *Sylvain v. Boston & Maine R.R.*, 280 Mass. 503, the court said at page 506:

"What is relied on as evidence of negligence is the order from Crowley to the plaintiff to get down on his knees and push the roll up. The manner of executing

that order was left to the plaintiff, an experienced man who knew the dangers as well as Crowley. The order did not require the plaintiff to use any negligent or dangerous method."

2. Furthermore, the defendant was not negligent in keeping the lights extinguished at the doorway in the rear of the engine house in obedience to the "dim-out" regulations.

(a) The District Court took judicial notice of the fact that the Governor of the Commonwealth of Massachusetts had issued "dim-out" regulations under Executive Order No. 55 (R. pp. 188-189), and in his charge to the jury the applicable provisions were read:

"All lights of every nature and from whatever source . . . shall be permanently shielded, obscured or reduced in intensity so that no light or reflection therefrom shall be visible from any point on the waters of the Atlantic Ocean to the seaward side of the line described below. If lights thus visible cannot be so shielded or controlled they shall be extinguished. . . ."

"All lights used for out of doors manufacturing, repair work, shipbuilding, necessary handling or storage of raw or finished materials, for any type of construction work, in railroad yards or for raising of crops and poultry shall be permanently shielded so that all light is projected at least 30 degrees below the horizontal. Lights which cannot be so controlled shall be extinguished."

The judge of the District Court also instructed the jury (R. p. 189) that the regulations applied to the premises where the accident occurred, and that the railroad was

absolutely bound to obey this order, which had the force of law, and any action the railroad took had to conform to the order (R. p. 188).

Mr. Lewis, general foreman of the roundhouse, testified (R. p. 145) that after the "dim-out" regulations went into effect, there was an order that the lights at the back doors of the engine house were to be kept out; and that in pursuance of this order the lights at the doors were kept out.

(b) The undisputed evidence shows that during the time these "dim-out" regulations were in force, including the day of the accident, the lights at the doorways were kept extinguished (R. pp. 29, 47, 51, 115, 117, 118, 123, 145).

The defendant was not negligent in obeying the "dim-out" regulations, which, as the judge of the District Court stated (R. p. 188), had the force of law.

Johnson v. Maine Central R. Co. (Sept. 30, 1944), 38 Atl. (2d) 884.

3. The "dim-out" regulations were in effect at the time the plaintiff was first employed, and in pursuance thereof the lights were kept extinguished at the doorways at the rear of the engine house. Since that was the condition of the premises at the time of the hiring of the plaintiff, the defendant owed the plaintiff no duty to change that condition, particularly in view of the "dim-out" regulations, which continued in full force and effect at the time the plaintiff was injured.

Delaware &c. R.R. Co. v. Koske, 279 U.S. 7, 12.

Sylvain v. Boston & Maine R.R., 280 Mass. 503, 505.

Sjostedt v. Webster, 306 Mass. 344, 346.

Lakube v. Cohen, 304 Mass. 156, 161.

In *Delaware &c. R.R. Co. v. Koske*, 279 U.S. 7, the court said at page 12:

“There was nothing obscure or of recent origin about the place where he was injured. The conditions were constant and of long standing.”

In *Sylvain v. Boston & Maine R.R.*, 280 Mass. 503, the court said at page 505:

“But the defendant may still rely upon the so called contractual assumption of risk, the doctrine that a servant assumes the risk of the conditions of the employment which were existing and manifest when the employment began; a doctrine more accurately expressed by saying that the master owes the servant no duty to change the obvious conditions and methods of business in use when the employment began, even though they are less safe than others, and so cannot be charged with negligence in continuing them.”

In *Sjostedt v. Webster*, 306 Mass. 344, the court said at page 346:

“It was a known risk incident to the employment, and the defendant was under no obligation to change the obvious conditions of his premises or to improve the obvious methods of business that existed at the time the employment began. The risk arising from such conditions became a part of the contract of employment and continuance of such conditions did not constitute negligence of the employer.”

The foregoing rule that an employer owes no duty to his employee to change the condition of his premises as they existed at the time of the hiring has not been abrogated or changed by the amendment of 1939 to the Act of 1908

(Federal Employers' Liability Act) abolishing the defense of assumption of the risk. That amendment has abolished "voluntary assumption of the risk," which is the assumption of risk of conditions created by the negligence of the employer. And there is nothing in *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 (1942), to the contrary. In fact, the concurring opinion of Mr. Justice Frankfurter (pp. 68-73) makes it abundantly clear that what was abolished was voluntary assumption of the risk.

II. The alleged insufficiency of the lighting at the time and place where the plaintiff was injured was not the proximate cause of his injuries.

1. Under the Federal Employers' Liability Act (U.S.C. Title 45, c. 2, § 51) liability arises from negligence, and that negligence must be the cause of the injury.

Atchison, T. & S.F. Ry. Co. v. Toops, 281 U.S. 351, 354-355.

Brady v. Southern Ry. Co., 320 U.S. 476, 484.

Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67.

B. & O. R. Co. v. Berry, 286 U.S. 272, 276.

In *Atchison, T. & S.F. Ry. Co. v. Toops*, 281 U.S. 351, the court said at pages 354-355:

"But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer."

In *Brady v. Southern Ry. Co.*, 320 U.S. 476, the court said at page 484:

“Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury.”

And it is well settled that the burden is on the plaintiff to prove a causal relation between his injuries and the defendant's negligence.

Wheelock v. Freiwald, 66 Fed. (2d) 694, 698.

New York Central R. Co. v. Ambrose, 280 U.S. 486, 489-490.

Penn. R. Co. v. Chamberlain, 288 U.S. 333.

Atchison, T. & S.F. Ry. Co. v. Saxon, 284 U.S. 458, 459.

In *Wheelock v. Freiwald*, 66 Fed. (2d) 694, the court said at page 698:

“A verdict cannot be permitted to stand, which rests upon conjecture, surmise, or speculation, but plaintiff must produce substantial affirmative proof that the negligence of the carrier caused the injury.”

In *New York Central R. Co. v. Ambrose*, 280 U.S. 486, the court said at pages 489-490:

“In any view of the matter, the respondent (plaintiff) upon whom lay the burden, completely failed to prove that the accident was proximately due to the negligence of the company. It follows that the verdict rests only upon speculation and conjecture, and can not be allowed to stand.”

2. There was considerable evidence about the condition of the lighting in other parts of the roundhouse than

the place where the accident happened (R. pp. 60-87; Ex. 3, R. pp. 75-76). There was evidence (R. p. 108) that when the electric-light switches were turned on some of the lights went on and some would not go on between the front and rear of the building at pit 48. There is no evidence, however, and the plaintiff makes no contention, that the lighting was insufficient to enable the plaintiff to do his work while he was actually engaged in repairing the front wheels of engine 3631, near the front of the roundhouse (R. pp. 42, 45, 47, 50, 51, 60, 89, 99, 100, 116, 117). And the plaintiff's injuries did not result from the condition of the lighting where he had actually been working.

In this connection the plaintiff's witness Guess, who was the machinist under whom the plaintiff was working (R. pp. 23, 44), testified without contradiction that there were three or four lights burning at the front of the engine (R. p. 47), two on each side of the locomotive where they were doing their repair work (R. pp. 48, 51, 56); and that, in addition to the four lights, two on each side of the locomotive, shown on Exhibit A (R. p. 197), Cabana had an extension light which he was holding for him (Guess) (R. pp. 45-46, 52, 56); that they had such extension lights as they needed to do their work properly (R. p. 56); and that he did not need the light down at the end of the track (toward the door) to do the work they were doing on the engine up at the other end (R. p. 60).

This witness also testified (R. pp. 56-57) that the light nearest the turntable at the other end of the track, which he had said was burning, was only about the length of a tank—about 25 to 30 feet—away from Cabana, who was picked up 8 feet from the door at the back end (R. p. 48).

3. Although the lights were extinguished at the doorway of track 48 in the rear of the building, there was still

sufficient light to enable the plaintiff to see where he was going. The accident happened in the evening at about 9 o'clock War Time (R. p. 25), which would be about 8 o'clock Standard Time, on August 17, 1943. This was only about an hour and a quarter after sunset, and the court will take judicial notice that at that time there was still natural light.

Delaware &c. R.R. v. Koske, 279 U.S. 7, 12.

The plaintiff had no difficulty in locating the narrow plank walk over which he was crossing at the time of the accident. Although it was beginning to be dark (R. p. 161), it was light enough to enable the hostler to see the plaintiff near the doorway when the plaintiff, *after the accident*, was on the hostler's side of the locomotive (R. pp. 161-162).

The plaintiff did not testify that he could not see where he was going or what he was doing, and there is no evidence that he could not have seen the locomotive backing into the building, *if he had looked*. The engine was moving slowly at not more than 3 or 4 miles an hour (R. p. 160), and if the plaintiff was walking at the average rate of speed, the engine could not have been more than 7 or 8 feet away from him when he stepped on the track. There is no evidence that the plaintiff, before he stepped on the track, looked in the direction from which the locomotive was backing.

4. The conclusion is irresistible that there was no causal relation between the condition of the lighting and the plaintiff's injuries.

(a) The plaintiff was injured while he was crossing pit 48 near the doorway at the back of the building, and there is no evidence which would warrant a finding that the con-

dition of the lighting at this place was the proximate cause of the plaintiff's injuries. The hostler, who was operating engine 1624 (R. p. 159), was sitting on the right-hand or engineer's side of the locomotive (R. pp. 162, 165), and there was no one sitting on the fireman's side of the locomotive. The hostler, who was found by the jury (R. pp. 3-4 (complaint, 2d count) and p. 8) not to have been negligent in the operation of the locomotive, testified (R. p. 160) that he did not see the plaintiff before the accident, and the undisputed evidence (R. pp. 162, 16) shows that he could not have seen the plaintiff. The hostler could not have seen the plaintiff before he stepped on the track because the hostler was on the engineer's seat (R. pp. 162, 165), while the plaintiff approached the track from the fireman's side of the locomotive. Furthermore, the hostler's view of the plaintiff was obstructed both by the height of the tender above the rails (R. pp. 16, 160, 161) and by the overhang of the tender (R. pp. 15, 161). The hostler's eye was 10 feet 1 inch above the rail (R. p. 16), and the height of the tender above the rail was 10 feet 3 inches (R. p. 16). Manifestly it was impossible for the hostler to see the plaintiff over the top of the tender, even if the area near the doorway had been brightly lighted, either before the plaintiff stepped upon the track or while he was crossing.

If the jury disbelieved this evidence, then the record is bare of any evidence to support the plaintiff's burden of proving that the hostler could have seen him in time to prevent the accident, since disbelief of testimony is not the equivalent of proof of facts contrary to that testimony.

Boice-Perrine Co. v. Kelley, 243 Mass. 327, 330.

McDonough v. Vozzela, 247 Mass. 552, 558.

Tanona v. N.Y., N.H. & H. R.R. Co., 301 Mass. 589, 592.

(b) The law is well settled that recovery will be denied in all cases where the injured employee has failed to show a causal relation between his injuries and the alleged insufficient lighting.

O'Brien v. Boston & Maine R.R., 265 Mass. 527, 529, 530.

New England Newspaper Pub. Co. v. M'Neight, 209 Fed. 18, 21.

Kolbow v. Manufacturing Co., 318 Mo. 1243, 1249.

Cain v. Humes Deal Co., 329 Mo. 1107, 1113, 1116, 1117.

Jackson v. Gulf Elevator Co., 209 Mo. 506.

In *O'Brien v. Boston & Maine R.R.*, 265 Mass. 527, the court said at pages 529-530:

"The important question is, Was there any evidence of negligence on the part of the defendant or its agents? Assuming that it was dark, that there was no electric light, there is nothing to show that the plaintiff was injured because of the absence of light."

In *New England Newspaper Pub. Co. v. M'Neight*, 209 Fed. 18, the court said at page 21:

"It does not seem to us that on the record in this case reasonable men could fairly conclude that the light was inadequate, or that the want of it was the cause or a contributing cause of his injury."

In *Kolbow v. Manufacturing Co.*, 318 Mo. 1243, the court said at page 1249:

"Another ground of negligence alleged was that the place was insufficiently lighted, and the plaintiff produced some evidence to that effect. There was not a

thing in the evidence to show that the insufficient light, if there was such, had anything to do with the injury."

In *Cain v. Humes Deal Co.*, 329 Mo. 1107, the court said at p. 1111:

"Plaintiff's petition contained the following charges of negligence from which his injuries were claimed to have directly and proximately resulted: . . .

"2. That said defendant did negligently and carelessly omit to furnish an adequate and sufficient amount of light to do the work aforesaid."

And at page 1113:

"If the evidence fails to show that defendant's failure to furnish more light in the room had any causal connection with McDaniel's striking the nail as he did with his shovel, then there was nothing to submit to the jury and defendant's demurrer, at the close of the whole case, should have been sustained."

The court further said at page 1116:

"The nonexistence of a legal connection between the negligence and the injury is predicable whenever, for aught that appears, the accident might have happened even if the defect in question had not existed, or if the precautions which were omitted had been taken. The master cannot be held liable if his negligence was merely a condition, as opposed to the efficient cause of the injury."

And at page 1117:

"We are therefore forced to the conclusion that plaintiff's injury was not caused by the negligence charged against defendant in plaintiff's petition, fail-

ure to provide a safe place to work; and that defendant's failure to furnish more light in the room was not the proximate cause of his injury."

5. The sole proximate cause of this plaintiff's injury was his own negligence.

The evidence in its aspect most favorable to the plaintiff shows that instead of crossing pit 48 the safe way provided by his employer, and the shortest way, as he testified (R. p. 41), by going in front of the locomotive, he chose to cross it at the rear of the building, where he knew there were no lights at all (R. p. 29), and where there had been no lights since he entered the defendant's employment. Although there was sufficient natural light—the accident having happened about an hour and a quarter after sunset (R. p. 25)—to enable the plaintiff to see the narrow walk on which he was crossing, and to enable him to see the backing locomotive, *if he had looked*, the plaintiff stepped upon the track when the approaching locomotive was only a few feet away from him.

Since the jury found that the operation of the locomotive was not negligent, and since the condition of the lighting was not the proximate cause of his injury, it follows that the plaintiff's injury resulted entirely from his own negligence, and it is well settled that where an employee is injured by his own negligence, which is the sole and direct cause of his injuries, he cannot recover.

B. & O. R. Co. v. Berry, 286 U.S. 272, 276.

Atlantic Coast Line R. Co. v. Davis, 279 U.S. 34, 39.

McGivern v. Northern Pac. Ry. Co., 132 Fed. (2d) 213, 219.

In *B. & O. R. Co. v. Berry*, 286 U.S. 272, the court said at page 276:

"If negligence caused the injury, it was exclusively that of the respondent. Proof of negligence by the railroad was prerequisite to recovery under the Federal Employers' Liability Act."

In *Atlantic Coast Line R. Co. v. Davis*, 279 U.S. 34, the court said at page 39:

"And the inevitable conclusion from all the evidence is that he voluntarily abandoned the safe position on the running board which he at first assumed and placed himself in a position of extreme danger on the 'jack-arm,' a place not furnished for the performance of this work and ill adapted thereto, and one of obvious danger in which he would inevitably be struck if the boom made a full swing unless he moved out of its path; and thereby through his own negligence, as the sole and direct cause of the accident, brought on his own death. Under these circumstances there is plainly no ground upon which the liability of the Railroad Company may be predicated."

In *McGivern v. Northern Pac. Ry. Co.*, 132 Fed. (2d) 213, the court said at page 219:

"Here the negligence was that of McGivern alone. It was his failure to act that resulted in his injury and defendant cannot be held liable therefor."

III. The Circuit Court of Appeals erroneously decided the case upon a ground not raised by the pleadings and not within the theory of the case as tried.

In its opinion (R. p. 211) the Circuit Court of Appeals holds that it is not necessary to decide the question raised by the appellant whether or not it was physically possible for the hostler to see around or over the tender and not necessary to decide if the jury could reasonably infer that, had there been adequate lighting, the hostler would have been able to see the plaintiff in time to avoid the accident, upon the ground, as the court holds, that, regardless of whether or not the hostler was in a position to see the plaintiff, the evidence clearly warranted a finding that, if there had been adequate lighting, the plaintiff would have been able to see the backing engine in time to get out of the way.

The evidence in the case does not warrant a finding that the plaintiff could not have seen the backing engine in time to get out of the way *if he had looked*. There is no evidence that he did look.

The Circuit Court of Appeals in its opinion (R. p. 207) states that from all the evidence the jury could reasonably infer that the area in which the accident occurred, both in and outside the engine house, was pitch dark. The accident happened in the evening at about 9 o'clock War Time (R. p. 25), which would be about 8 o'clock Standard Time, on August 17, 1943. This was only about an hour and a quarter after sunset and the court will take judicial notice that at that time there was still natural light.

Delaware, Lackawanna & Western R.R. Co. v. Koske, 279 U.S. 7, 12.

The plaintiff had no difficulty in locating the narrow plank walk over which he was crossing the pit at the time of the accident, and although it was beginning to be dark (R. p. 161), it was light enough to enable the hostler to see the plaintiff near the doorway *after the accident* when the plaintiff was on the hostler's side of the locomotive

(R. pp. 161-162). The evidence in the case does not warrant the conclusion of the Circuit Court of Appeals that at the time the accident happened the jury could find that it was pitch dark in the area, both in and outside the engine house.

The plaintiff does not in his complaint allege that the defendant was negligent because it failed to provide sufficient light to enable the plaintiff to see the locomotive as it was backing into the engine house. On the contrary, the plaintiff alleges in his complaint, and the case was tried upon the theory, that his injury arose out of *the failure of the hostler to observe the plaintiff*, which failure was caused in whole or in part by the darkness which existed in the engine house (R. p. 3). There was no evidence that the plaintiff looked in the direction from which the locomotive was backing.

The evidence is insufficient to warrant a finding that the plaintiff could not have seen the locomotive *if he had looked*.

In support of its decision that, if there had been adequate lighting, the plaintiff would have been able to see the backing engine in time to get out of the way the Circuit Court of Appeals relies upon the case of *Tiller v. Atlantic Coast Line R.R. Co.*, decided by this court on January 15, 1945, Lawyers Edition Advance Sheets, volume 89, page 403.

In that case the plaintiff's complaint as amended alleged that, in violation of the Boiler Inspection Act, the defendant used a locomotive which was in improper condition in that it did not have proper lights; and that it also operated said locomotive without proper lights, in violation of the rules and regulations prescribed by the Interstate Commerce Commission; and that the defendant's agents and servants were negligent in failing to keep the locomotive properly lighted.

This court in its opinion holds that it was for the jury to determine whether the failure to provide this required

light on the rear of the locomotive proximately contributed to the deceased's death; and that the diffused rays of a strong headlight, even though directly obscured from the front, might easily have spread themselves so that one standing within three car-lengths of the approaching locomotive would have been given warning of its presence, or at least so the jury might have found.

In the Tiller case the failure to have the light on the locomotive was a violation of a statute and also a rule and regulation of the Interstate Commerce Commission made pursuant to the statute; and, furthermore, the plaintiff's complaint alleged that his injuries were due to such violation of statute and to the failure on the part of the servants of the defendant to properly warn the plaintiff of the approach of the train by keeping the locomotive properly lighted.

The complaint in the present case is based upon negligence of the defendant in failing to furnish adequate light as a result of which it is alleged that *the operator of the locomotive was unable to see the plaintiff* in time to prevent the injury. There is no violation of statute in this case.

The uncontradicted evidence clearly shows that the hostler, regardless of the lighting conditions, was unable to see the plaintiff prior to the accident. The inability of the plaintiff to see the locomotive—if he were in fact unable to see it—was not an issue under the pleadings and not within the theory of the case as it was tried.

Furthermore, even if the failure of the plaintiff to see the locomotive because of inadequate lighting was an issue raised by the case, the Circuit Court of Appeals erroneously decided it.

In the Tiller case it does not appear that the plaintiff was not looking in the direction from which the locomotive was coming. In the present case there is no evidence from the plaintiff or anyone else that prior to the accident the plaintiff looked in the direction from which the locomotive

was backing. The failure to have lights outside the engine house at the time of the accident, if such a failure resulted in inadequate light and darkness even in spite of the hour of the accident (8 p.m. Standard Time), nevertheless, such failure was not a proximate cause of the plaintiff's injuries. The proximate cause of the plaintiff's injuries was his failure to look in the direction from which the locomotive was backing, and this was not due to inadequate lighting. The plaintiff does not make the claim in his complaint that his injuries were due to failure on his part to see the locomotive because of inadequate lighting.

Conclusion.

The defendant respectfully submits that the District Court of the United States for the District of Massachusetts committed reversible error in the trial when it failed to direct a verdict for the defendant on count I of the plaintiff's complaint; and that the decision of the Circuit Court of Appeals for the First Circuit in affirming the judgment of the District Court of the United States for the District of Massachusetts is erroneous.

Wherefore the petitioner prays that a writ of certiorari issue as prayed for in its petition.

Respectfully submitted,

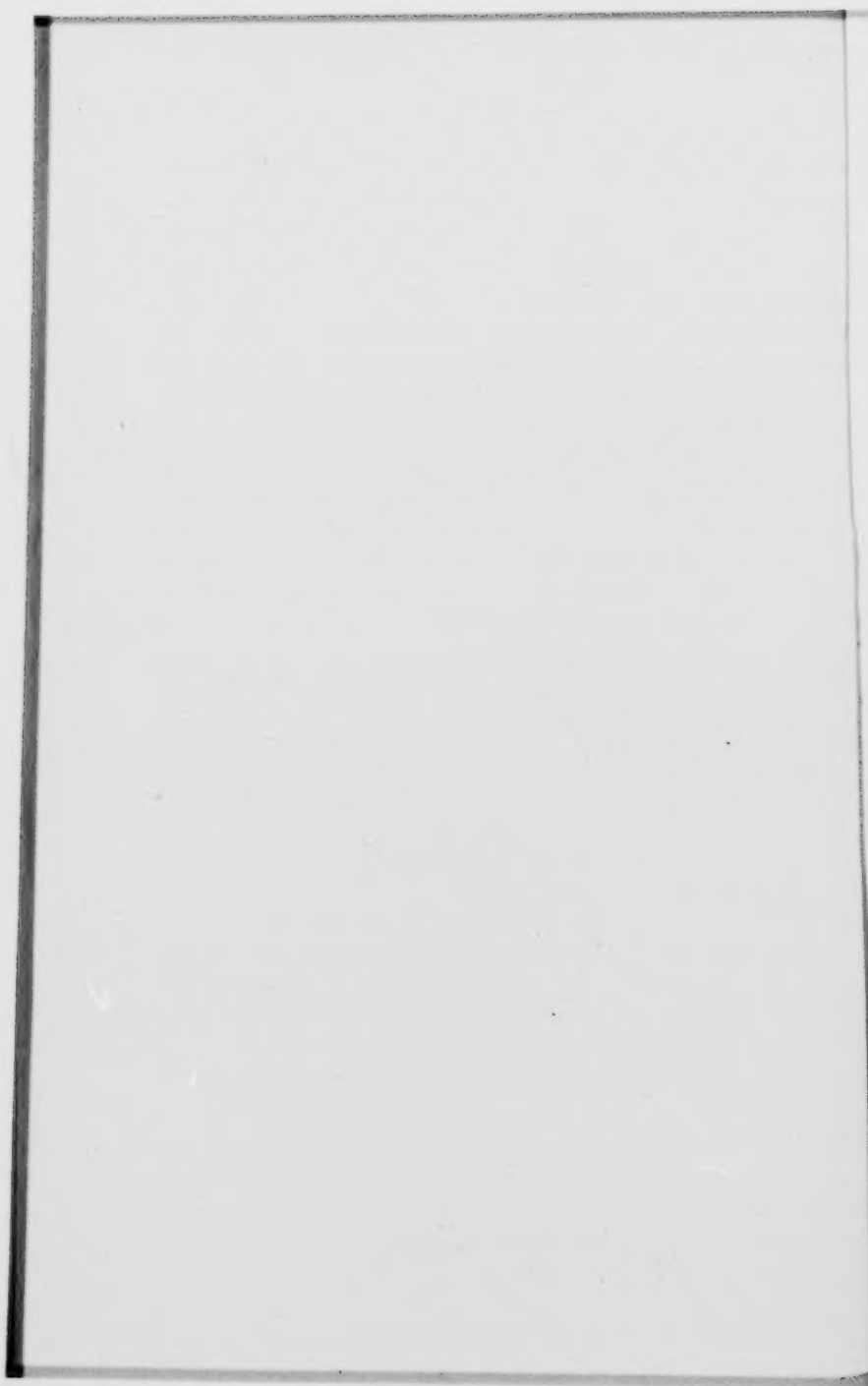
BOSTON AND MAINE RAILROAD,

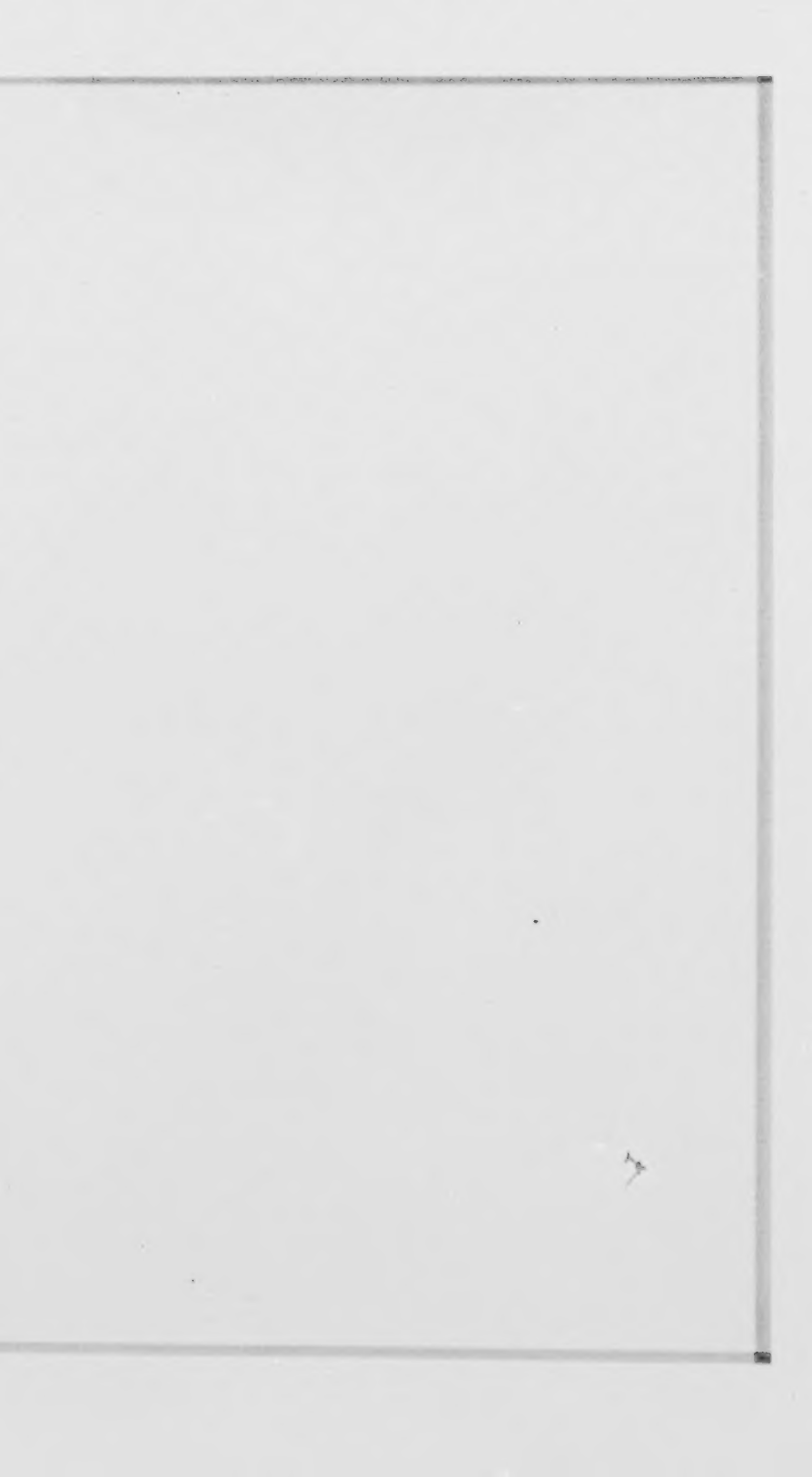
By its Attorney,

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1256.

BOSTON AND MAINE RAILROAD,
Petitioner,

v.

EDWARD L. CABANA,
Respondent.

**RESPONDENT-EMPLOYEE'S BRIEF AGAINST THE
ISSUANCE OF THE WRIT OF CERTIORARI.**

PHILIP NICHOLS,
EDWARD S. FARMER,
Attorneys for Edward L. Cabana,
Respondent.

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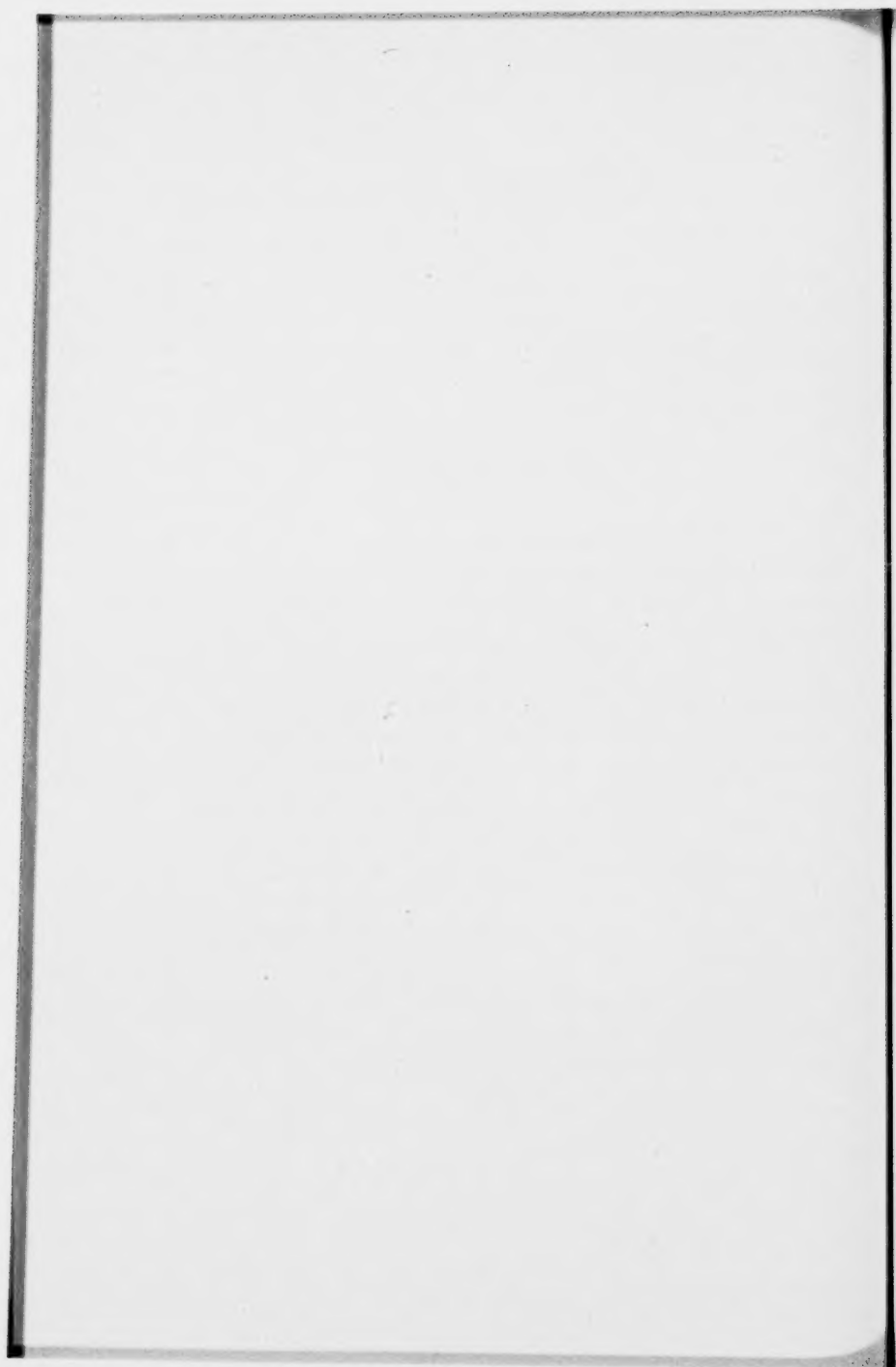
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OCTOBER TERM, 1944.

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BOSTON AND MAINE RAILROAD,
Petitioner,

v.

EDWARD L. CABANA,
Respondent.

RESPONDENT-EMPLOYEE'S BRIEF AGAINST THE ISSUANCE OF THE WRIT OF CERTIORARI.

This is a petition for a writ of certiorari seeking review of a judgment entered in the Federal District Court for Massachusetts and affirmed by the Circuit Court of Appeals for the First Circuit by a unanimous opinion. Substantially all arguments set forth by the petitioner in its brief in support of the petition are dealt with in the opinion of the Circuit Court which appears on Pages 204 to 210 inclusive of the record.

All the contentions made by the petitioner under the first two reasons relied upon for the allowance of the writ are expressly discussed in the Circuit Court's well-reasoned opinion, and further discussion by the respondent herein is hardly required in view of the convincing manner with which they were discussed in this opinion.

Argument.

The petitioner assigns on Page 6 of its brief three reasons for the allowance of the writ prayed for. The only ground not heretofore discussed in the aforesaid opinion is contained under Paragraph 3 of the said reasons and will be considered in this brief.

One.

It is submitted that there was abundant evidence to warrant a finding that the petitioner herein was guilty of a breach of duty to the respondent-employee in regard to the condition of the lighting at the place where the respondent was injured.

A perusal of the record reveals ample support for the jury's finding, and the decision of the Circuit Court of Appeals discloses the substantial basis which warranted the finding of the jury on this aspect of the case. Nothing would be added by any further discussion of the evidence upon which the jury reached its finding in respect to the existence of the duty of the petitioner-employer to the respondent-employee and its negligent violation of that duty during the months that preceded this accident.

Two.

The darkness in and around the area of the engine house where the accident occurred was a causal factor in the happening of the accident and resulted in whole or in part in the injuries sustained by the respondent. *Tennant, Admr. v. Peoria & Pekin Union Ry. Co.*, 321 U. S. 29; *Tiller v. Atlantic Coast Line R. R. Co.*, January 15, 1945, Lawyers

Edition Advance Sheets, Vol. 89, Page 403; *Delaware L. & W. Co. v. Berry*, 48 Fed. (2d) 1052; *Underwood v. Louisville & Nashville R. R. Co.*, 131 Fed. (2d) 306; *Waddell vs. Chicago & E. I. R. Co.*, 142 Fed. (2d) 309.

(a) It is the contention of the respondent-employee that the hostler, in his position in the cab of locomotive No. 1426, did actually see a body move while backing, and before he came to a full stop, which warranted the jury in inferring that his failure to discern the respondent more clearly from the self same position prior thereto, was due to the prevailing darkness. Henry Cote, the hostler, on cross-examination (R. 162-166), testified in substance as follows:

That he backed Engine No. 1426 (58½ feet long) from the turntable to the point of the accident, a distance of two and one-half times its length. That he backed it slowly and carefully at the rate of 3 miles per hour; that it was very dark at the entrance to Pit 48 and that there were no lights inside the engine house nor outside said engine house except the red and green lights on the turntable, the flood light having been discontinued. That he was on the right-hand side of the engine as it backed from the turntable (on the side where the accident occurred) with his head out and looking back as he backed. That he saw a body move, heard someone holler and then stopped. That he saw a man standing up—a figure of a man in an upright position.

The argument of the petitioner, that the cab seat in locomotive 1426 was so situated as to preclude the possibility of the hostler, fully seated in the cab, from seeing the respondent in the path in which he was backing, even though it was well illuminated, is untenable on the very testimony of the

hostler himself. His testimony that his head was out and that he was looking back as he backed, saw first a body move, then a man standing up—a figure of a man in an upright position, destroys the petitioner's argument based on the position of the cab seat and the construction of the cab. Not only was the hostler in a position as he backed, from which he could see but in the darkness therein prevailing according to his own testimony, he was able to discern a body move before he brought his locomotive to a full stop. He observed movement and saw the position of the respondent, and it was a reasonable inference that had the rear end of Pit 48 been illuminated in any manner whatsoever he would have seen the respondent in time to prevent this unhappy catastrophe. *Sweeting v. Penn. R. Co.*, 142 F. (2d) 611, 614.

(b) From the evidence of the respondent (R. 26) and the evidence of Henry Côté (R. 164), and from all the other evidence in the record, the jury could infer the mechanics of the accident. They also saw and observed the respondent on the stand. It is submitted that the jury would be abundantly warranted in inferring that were it not for the pitch darkness enveloping the area where the accident occurred, the respondent herein, in possession of all his faculties, walking erect at the time of the impact, would have seen the close proximity of the tender of the backing locomotive and would have been able, in time, by his own efforts to reach a position of safety. A slight movement would have taken him out of the path of the backing tender. It was readily inferable that the utter darkness prevailing at this point prevented him from seeing the close proximity of the backing tender and was the direct cause of his total unawareness of the approach of danger until too late to avert it. *Thomson v. Boles*, 123 Fed. (2d) 487, 493.

To be sure the respondent was never asked the direct question as to whether he had looked, but the fact that the respondent had looked was clearly warranted by his answers to Questions 104 and 105 on his direct examination (Record Page 28) which were as follows:

Q.104. Now as engine 1426 approached was there any light on the tender or any part of the engine? A. There was no light on it.

Q.105. What if any light was on the tender or locomotive 1426? A. There was no light at all.

(c) The fact that the jury by its verdict on Count 2 of the respondent's Bill of Complaint exonerated the hostler from all negative negligence in connection with the backing of locomotive No. 1426 reveals that the jury, having seen all parties and heard all evidence, inferred that the darkness was the dominant factor in the happening of this accident. By its verdict on Count 2 the jury showed it regarded no intervening human agency operating on the darkness as a condition entering into the stream of causation. By its verdict the jury clearly demonstrated that it did not consider darkness as a mere condition but rather as an efficient proximate cause of the result.

Three.

The contention contained in the assigned reason No. 3 for the allowance of this writ is clearly without merit for the following reasons:

(a) All circumstances of the accident were fully explored in the trial before the District Court. The issue of causation was fully tried before the jury. Both under direct and cross examination counsel for the parties inquired into

every possible phase of the happening. Nowhere does the record disclose that a single objection was made by counsel for the petitioner on the ground that this evidence sought to be adduced did not conform to the pleadings in the case. The record is absolutely bare of any claim that inquiry into the possible causes of the accident should be confined exclusively to the inability of the hostler, Henry Cote, to see the respondent.

(b) An examination of the petitioner's Motion for Directed Verdict, (Pages 6 and 7 of the Record) does not reveal any claim for the allowance of the motion based upon the ground that there was a fatal variance between the cause as pleaded and the cause as proved. Ten grounds are set forth in support of this petitioner's general Motion for a Directed Verdict and the ground of variance is not implicit in any of the reasons assigned. Moreover, the petitioner's "Statement of Points To Be Relied Upon on Appeal" which is set forth in Pages 199 and 200 of the Record, does not disclose any claim expressly or by implication that the appellant therein relied on any claim of variance between the cause as alleged and the cause as proved.

Rule 50 of the Federal Rules of Civil Procedure in Subdivision (a) thereof contains a requirement that the Motion for a Directed Verdict shall state the specific grounds therefor. The reason for the rule is obvious. Orderly procedure requires that the Trial Judge be informed or apprized of the basis of all motions for directed verdicts so that in season, errors might be corrected or the cause disposed of in a manner that would not involve the Court in further unnecessary litigation. Sound justice requires such a rule and it would defeat the very purpose of the rule if the petitioner after trial for the first time were permitted to

raise as a reason for reversal a ground that had never prior thereto been claimed. A careful perusal of this record will reveal that there never was a suggestion that there was a fatal variance between the cause as pleaded and the cause that was established in evidence. A belated oral argument before the Circuit Court of Appeals not contained in the brief of the then appellant hardly meets the requirements of the Rule.

(c) The Circuit Court in its opinion (Pages 204 to 210 inclusive of Record) did not rule that the accident could not have been found to have been caused in whole or in part because of the inability of Henry Cote, the hostler, to see the respondent by reason of the darkness, in season to prevent the accident. It is submitted that the jury were warranted in finding that in the enveloping darkness that prevailed at the place where the accident occurred the inability of the hostler to see the respondent in time was a causal factor in the happening of the accident.

(d) If it appeared to the Circuit Court of Appeals that the evidence warranted a finding for the respondent only on the basis of the inability of the respondent to see rather than on the basis of the inability of the hostler, it might have well so ruled and affirmed the judgment after allowance of an amendment which would make the pleadings conform to the case that was tried. There was ample power in the Circuit Court to affirm the result conditioned on the allowance of an amendment which would conform to the evidence adduced at the trial. Rule 15, Sub-division (b) of the Federal Rules of Civil Procedure confers this authority on the Court. Substantial justice is thus effectuated and such a course would be usual procedure on the part of any Appellate Court under the authority of this rule. It would cer-

tainly be out of line with enlightened procedure to require the complete retrial of a cause that had been fully tried or to reverse a result after a trial where every possible issue had been litigated. The fact that the Circuit Court of Appeals in its order did not make any such requirement as a condition of its affirmation reveals without a shadow of a doubt that the Circuit Court of Appeals regarded this claim of variance on the part of the petitioner herein as captious and in nowise affecting the substantial rights of the parties. *Cabel v. United States*, 113 F. (2d) 998 (1940).

Respectfully submitted,

PHILIP NICHOLS,
EDWARD S. FARMER,
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Respondent.

End

